IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
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OCTOBER TERM, 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS' PARTY, *Et Al.*,
Plaintiffs-Appellees.

Consolidated with

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, *Et Al.*,
Plantiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS,
Defendant-Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF OF APPELLEE — SOCIALIST WORKERS' PARTY, *ET AL.*

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BRIEF OF APPELLEE — SOCIALIST WORKERS' PARTY, *ET AL.*

QUESTION PRESENTED

1. Is a state statute which requires a candidate for local office to demonstrate a greater quantum of support than a candidate for state-wide office unconstitutional?

SUMMARY OF ARGUMENT

I.

The Illinois Election Code, Chap. 46, §§10-2 and 10-3 require minor party and independent candidates to display, both absolutely and relatively, more support to run for office in Chicago and Cook County. This requirement is so irrational and arbitrary that it cannot be justified in view of its impact on important constitutional rights.

II.

The appellant has tried to block review of the constitutional challenge sustained below by invoking the doctrines of *stare decisis* and *law of the case.* Neither doctrine applies because the issues raised by appellees were not addressed or decided in *Jackson* v. *Ogilvie,* 403 U.S. 925 (1971) which appellants rely on.

ARGUMENT

I.

THE ADDED BURDEN ON LOCAL CANDIDATES IMPOSED BY ILLINOIS ELECTION LAW IS ARBITRARY, IRRATIONAL AND NOT REASONABLY RELATED TO A LEGITIMATE STATE INTEREST.

The Illinois Election Code, Ill. Rev. Stat. Ch. 46, §10-2 provides that "new" political parties can have their candidates for state-wide office placed on the general election ballot by filing petitions signed by not less than 25,000 qualified voters. Further that such parties can have their candidates for local office placed on the ballot by filing petitions signed by qualified voters equaling in number 5% of the vote from that locale in the preceding election.

The effect on this statute is to require Appellant to file 25,000 signatures if it wishes to run a candidate for state office, while requiring 35,000 signatures or more if it wishes to run a candidate in Chicago or Cook County.

Appellees contend that §10-2 as applied to elections in Chicago or Cook County constitutes an unconstitutional infringement of their First Amendment right of association and their right to vote and denies them equal protection of the law.

States have a legitimate interest in regulating the electoral process so as to insure the integrity of the electoral process, and thus may condition the right to run for office so as to exclude frivolous candidates. *Jenness* v. *Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L. Ed. 2d. 554 (1971); *Bullock* v. *Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L. Ed. 2d. 92 (1972).

However, since such regulations are likely to burden the right to associate for political purposes and the right to

vote they will be subjected to close judicial scrutiny. *Williams* v. *Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L. Ed. 2d. 24 (1968); *Dunn* v. *Blumstein*, 465 U.S. 330, 92 S.Ct. 995, 31 L. Ed. 2d. 274 (1972).

Prior decisions of this Court have made it clear that States can require a minor party or an independent candidate to demonstrate a significant modicum of support in order to gain access to the ballot. *Jenness* v. *Fortson*, *supra*; *Stores* v. *Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L. Ed. 2d. 714 (1974).

Thus it could be argued that Illinois could have required that minor party and independent candidates demonstrate support equal to 5% of the electorate for the office they wish to contest. *Jackson* v. *Ogilvie*, 403 U.S. 925, 91 S.Ct. 2247 (1971). Summarily affirming 325 F. Supp. 864 (N.D. Ill., 1971).

However, this is not what Illinois has done. §§10-2 and 10-3 establishes two tests for such candidates. Perhaps due to an oversight in the way the statute was drafted, candidates for local office have a greater burden, both in relative and in absolute terms, than candidates for state-wide office.

Even if we assume that either test, standing alone, would withstand a constitutional challenge, it does not follow that a state can impose a relatively greater burden on a candidate for local office than that imposed on a candidate for state-wide office.

Even under conventional standards of review, legislative classifications violate the 14th Amendment guarantee of equal protection when arbitrary, irrational or when not reasonably related to the purpose of the legislation. *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U.S. 457, 80 S.Ct. 474 (1960); *Morey* v. *Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L. Ed. 2d. 1485 (1957).

Such classification must insure that all persons similarly situated will be treated alike, *Reed* v. *Reed* (1971) 404 U.S.

71, 92 S.Ct. 251, 30 L. Ed. 2d. 225; *Jenness* v. *Fortson*, *supra*.

Appellants have advanced no rationale explaining why the State would require candidates for office in Chicago or Cook County to demonstrate more support than candidates for state-wide office. Nor can any be imagined.

Even if some rationale for the added burdens placed on candidates for office in Chicago or Cook County could be articulated, §§10-2 and 10-3 are clearly unconstitutional.

Because of the important constitutional rights involved, more than the conventional standard described above is required.

The statute must not only be rationally related to a legitimate state interest, but must accomplish that objective by means which do "not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." *Lubin* v. *Panish*, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L. Ed. 2d. 702 (1974).

§§10-2 and 10-3 represents an additional burden on candidates for office in Chicago and Cook County which is both unnecessary and unfair. It is unnecessary because Illinois has determined that the support of 25,000 voters on a state-wide basis is sufficient to screen out frivolous candidates. It is unfair because minor party and independent candidates are required to expend their limited resources complying with an requirement which is unnecessary.

The additional burden placed on minor party and independent candidates for office in Chicago and Cook County deny Appellees equal protection of the law because it establishes an irrational and arbitrary classification without any rational relationship to a legitimate state interest.

Accordingly, §§10-2 and 10-3 cannot withstand scrutiny under conventional standards let alone under the close

scrutiny applied to statutes that burden important constitutional rights.

Furthermore, the added burden imposed by this statute, unconstitutionally burdens Appellee's rights of association and voting by requiring them to spend valuable resources complying with a requirement which is not rationally related to the states interest in excluding frivolous candidates.

II.

THE PRIOR DECISIONS RENDERED IN *JACKSON* v. *OGILVIE* ARE NOT CONTROLLING IN THE INSTANT CASE.

Appellants have argued that the decisions rendered by the District Court and the Court of Appeals in this case violate the principle of *stare decisis* or in the alternative violate *the law of the case*.

The doctrine of *stare decisis* does not apply to this lawsuit because the issue decided in *Jackson* v. *Ogilvie, supra,* is totally different from the issues decided by the Court of Appeals in this case.

Plaintiffs in *Jackson* v. *Ogilvie* contended that the requirement of the Illinois Election Code, §10-3 requiring independent candidates to submit petitions signed by qualified voters equal in number to 5% of those who voted in the last election for Chicago denied them ballot status because of the *amount* of signatures required. The District Court held that a 5% requirement was not unconstitutional in light of *Jenness* v. *Fortson, supra.*

In the instant case, Appellees have argued that the requirement of §§10-2 and 10-3 are unconstitutional as applied to elections in Chicago and Cook County, not because the amount, standing alone, is unconstitutional, but because

it exceeds the requirement for obtaining ballot status to contest state-wide elections.

This issue was simply not discussed nor decided in *Jackson* v. *Ogilvie, supra.*

Appellant urges that the doctrine of *stare decisis* applies because the issue raised by appellees in the instant case was implicitly or potentially present in *Jackson* v. *Ogilvie.*

The doctrine of *stare decisis* is designed to insure a uniformity of legal principles, not a uniformity of results.

Thus, it is clear that;

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall,* 266 U.S. 507, 511 (1925) citations omitted; See *United States* v. *L. A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37-38 (1952).

Appellants, recognizing the weakness of their arguments for application of the doctrine of *stare decisis* to this case, have argued that the doctrine of the *law of the case* makes *Jackson* v. *Ogilvie* finding a sort of appellate *res judicata.*

Appellants have cited Moore, *Federal Practice,* §0.404(1), p. 403 and *Antonioli* v. *Lehigh Coal and Navigation Co.,* 451 F. 2nd 1171 (3rd. Cir. 1971) as supporting the application of the doctrine of the *law of the case* to these proceedings.

A cursory review of Moore, *Federal Practice,* §0.404(1) discloses the following caveats with regard to the application of this doctrine to the instant case.

> "The general American doctrine is that a court is not inexorably bound by its own precedents, but in the interest of uniformity of treatment of litigants and of stability and certainty in the law will follow the relevant rule of law which it has established in earlier cases, unless clearly convinced that the legal rule

was originally erroneous or is no longer sound because of changed conditions and that more good than harm would come by departing from precedent. These same principles should, and in the main do, determine the doctrines of the law of the case for the federal courts." p. 401;

"As in the case of stare decisis, the federal doctrine of the law of the case applies to *principles* of law enumerated by the trial court and by the appellate courts." (emphasis added) p. 402.

"Normally the 'law of the case' may not be properly inoohed where the case is not the same; or where, although the case is the same, the matter now presented was not previously determined." pp. 403, 404.

Thus it is clear that the same principles which exclude the use of *stare decisis* to hold that *Jackson* v. *Ogilvie, supra,* is controlling, compel us to reach the same conclusions regarding the *law of the case.*

A reading of the authorities cited by Appellant makes it clear that the *law of the case* is designed to insure finality of decision in a single case. *Moore, supra,* pp. 401-406.

Appellants have attempted to extend this doctrine to subsequent litigation by confusing identity of parties with parties having an identity of interest. To do so would remove all meaningful distinctions between *res judicata, stare decisis* and *the law of the case.*

By omitting salient facts, Appellants have attempted to misapply the *Antonioli* case to the present case.

In *Antonioli, supra,* despite a change in name parties, the parties were identical.

"Although the named parties are different, both suits were class actions on behalf of all employees . . ." note 1177, p. 177.

The limited applicability of the *law of the case* was explained in *Antonioli, supra,* to mean;

". . . A second appeal may not be used to raise questions *in the same case* already put to rest by the same court upon a prior appeal." (emphasis added, citations omitted) p. 1178.

By distorting this doctrine, Appellants have tried to apply what in reality is the doctrine of *res judicata* to a subsequent case brought by different parties.

Appellants hope to avoid the need to put forth a rationale for a patently irrational statutory anomaly. The reason is obvious; they can not advance a rational justification for a requirement in Chicago greater than the 25,000 signatures required for state-wide elections.

CONCLUSION

For the reasons stated above, the Respondent, Socialist Workers' Party, *et. al.,* urges this Court to affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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